83-287

CASE NO.

IN THE
SUPREME COURT OF THE UNITED STATES

1983 TERM

ARTURO FERNANDEZ, :

Petitioner, :

v. :

UNITED STATES OF AMERICA, :

Respondent. :

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR CERTIORARI

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AFFIDAVIT OF MAILING

STATE OF FLORIDA)
) SS
COUNTY OF DADE)

I, ANDREW C. HALL, being duly sworn, state:

1. I am a member of the bar of this Court having been duly admitted on September 17, 1973. I am also a member of the Florida Bar having been duly admitted on December 2, 1968.

2. I am a Senior law partner in the firm of Hall and O'Brien, P.A. located at 1401 Brickell Avenue, Suite 200, Miami, Florida 33131, telephone number (305) 374-5030.

3. In my capacity as an attorney at Hall and O'Brien, P.A. and to the best of my knowledge, this firm prepared and mailed a Petition for a Writ of Certiorari on behalf of ARTURO FERNANDEZ against the UNITED STATES OF AMERICA on August 1, 1983.

4. The package containing 40 copies of the Petition for Writ of Certiorari was timely filed and deposited in a United States mailbox with first class postage prepaid on August 1, 1983, and was properly addressed to the Clerk of this Court within the time allowed for filing and three copies of the Petition was sent to each of the attorneys listed on the Certificate of Service below.

5. Pursuant to Rule 28 of the Supreme Court Rules, Affiant has timely filed the Petition for a Writ of Certiorari and can certify that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit was mailed as described above.

ANDREW C. HALL

SWORN TO AND SUBSCRIBED to before me this 1st day of August, 1983.

Notary Public
State of Florida at Large.

My Commission Expires: NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXPIRES NOV 24 1986
BONDED THRU GENERAL INSURANCE UND

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to MICHAEL L. PAUP, Chief, Appellate Section, United States Department of Justice, Washington, D.C. 20530 and Solicitor General, Department of Justice, Rex E. Lee, 10th and Constitution Avenue N.W., Washington, D.C. 20530 on this 1st day of August, 1983.

By:

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NOTICE OF APPEARANCE

ANDREW C. HALL, of HALL AND O'BRIEN, P.A., 1401 Brickell Avenue, Suite 200, Miami, Florida 33131 (telephone (305) 374-5030) hereby files this his Notice of Appearance as counsel for Petitioner, ARTURO FERNANDEZ in this cause. All parties are hereby directed to provide the undersigned with copies of all pleadings filed in this cause.

I HERBY CERTIFY that a true and correct copy of the foregoing was mailed on this 1st day of August, 1983 to MICHAEL L. PAUP, Chief, Appellate Section,

United States Department of Justice, Washington, D.C., 20530 and Solicitor General, Department of Justice, Rex E. Lee, 10th and Constitution Avenue N.W., Washington, D.C. 20530.

Respectfully submitted,

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By: _____
ANDREW C. HALL

3775G263.NOT/is

QUESTION PRESENTED FOR REVIEW

WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS IN AFFIRMING THE DISMISSAL OF THE PETITION OF ARTURO FERNANDEZ FOR DETERMINATION UNDER TITLE 26 U.S.C. SECTION 7429 (B) AS TIME BARRED HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are contained in the caption of the case.

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OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at 704 F.2d 592. It is reproduced below at Appendix pages 3-4. The opinion of the district court is reproduced below at Appendix pages 5-6.

JURISDICTIONAL STATEMENT

The judgment of the Eleventh Circuit Court of Appeals was entered on May 2, 1983.

This Court has jurisdiction pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

(1) Internal Revenue Code, Title 26 U.S.C. §7429 (b) (1) (1976).

> Judicial review-
>
> (1) Actions permitted-Within 30 days after the earlier of-
>
> (A) the day the Secretary notifies the taxpayer of his determination described in subsection (a) (3), or
>
> (B) the 16th day after the request described in subsection (a) (2) was made, the taxpayer may bring a civil action against the United States in a district court of the United States for a determination under this subsection.

(2) United States Constitution, Amendment V

> *No person shall* be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or

naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor *be deprived of* life, liberty, or *property, without due process of law;* nor shall private property be taken for public use, without just compensation. (Emphasis supplied).

STATEMENT OF THE CASE

1. Course of Proceedings and Disposition in Court Below

This action was commenced to challenge the termination assessment against ARTURO FERNANDEZ AND INVERSAL ADMINISTRACION E INVERSONES LIMITED, a Columbian limited partnership by the filing of a Petition on November 16, 1981. Record at 1-10; [hereinafter (R.at 1-10)]. Appendix at 10 - 19; [hereinafter (App. at 10-19)]. As a basis for federal jurisdiction, Petitioner relied upon Title 26 U.S.C. §7429 (b) (1) (A).

The government served its Motion to Dismiss the Petition on the grounds that the Court lacked jurisdiction over INVERSAL ADMINISTRACION E INVERSONES LIMITED and the Court lacked venue for the action over the Petitioner ARTURO FERNANDEZ and INVERSAL ADMINISTRACION E INVERSONES LIMITED. (R. at 13) (App. at 20). The government also alleged in its Motion to Dismiss that the action by Petitioner was time barred by the time limitations contained in Section 7429 of the Internal Revenue Code. (R. at 13) (App. at 20).

Thereafter, Petitioner filed a Motion for Extension of Time for the Court below to make a determination with respect to the Petition. (R. 42-43). That Motion was granted on December 4, 1981. (R. at 44). The Petitioner timely responded to the Motion of the United States to dismiss his petition. (R. at 51-56). The Motion to Dismiss was heard before the Court on January 4, 1982. (R. at 61). The Court withheld ruling at the hearing and requested Memorandum of Law to be filed. (R. at 62-75).

On January 12, 1981, the Court below entered its Order of Dismissal finding that a prerequisite for seeking judicial review of the jeopardy (sic) assessment is compliance with the time limitations in 26 U.S.C. Section 7429 (b) (1). (R. at 76). Therefore, the Court below determined that in order to be timely this action had to have been commenced within thirty (30) days after the earlier of November 2, 1981 (the date of the secretary's notification) or September 12, 1981 (the 16th day after the August 27th request by Fernandez for a judicial review). The Court reasoned that since this action was not filed until November 16, 1981, it was clearly time barred. (R. at 76). Because the Court disposed of the matter based upon a time limitation, Petitioner's constitutional arguments and venue questions were not addressed. (R. at 77). Thereafter, the Court ordered that the Petition be dismissed. (R. at 77).

In addition, on January 12, 1982 the Court recognized the *ore tenus* Notice of Voluntary Dismissal without prejudice of the cause on behalf of INVERSAL ADMINISTRACION E INVERSONES LIMITED. (R. at 78). Therefore, the limited partnership having voluntarily dismissed its case did not appeal from the Order of Dismissal and is not a Petitioner before this Honorable Court. The Notice of Appeal to the Eleventh

Circuit Court of Appeals of ARTURO FERNANDEZ, individually, was filed on February 2, 1982. (R. at 79). The Eleventh Circuit Court of Appeals affirmed the District Court's rulings (App. at 3-4) and this petition for writ of certiorari followed.

2. *Statement of the Facts*

ARTURO FERNANDEZ is a non-resident alien who is not engaged in a trade or business in the United States but acts as a broker for non-resident aliens through the operation of bank accounts including accounts in the United States for the exchange of currencies throughout the world.

It was apparently based on the Petitioner's bank deposits that the Internal Revenue Service assessed income and asserted the termination assessment. ARTURO FERNANDEZ challenged the termination assessment by administrative review provided by the Secretary and when that result was not in his favor, he turned to the District Court for judicial review.

On August 3, 1981, the Secretary of the Treasury through his revenue officers and service representatives entered a termination assessment against ARTURO FERNANDEZ under Section 6851 of the Internal Revenue Code of 1954. (R. at 5) (App. at 14-15).

As a result of that termination assessment by the Secretary or his agents, the Internal Revenue Service filed a Federal Tax Lien against FERNANDEZ in the sum of $2,848,881.00 (R. at 5-8) (App. at 16). As a result of the termination assessment and the filing of a Federal Tax Lien, the Secretary executed a Notice of Levy on the National Bank of North America in New York against one account held in the name of the Petitioner INVERSAL and allegedly owned by FERNANDEZ. (R. at 1).

Within thirty (30) days after the day in which FERNANDEZ was furnished with the written statement called for by Paragraph (a) (1) of Section 7429 of the Internal Revenue Code in 1954, ARTURO FERNANDEZ requested an administrative review through counsel. (R. at 8-9) (App. at 17-18).

The Secretary was requested to determine whether or not the making of the assessment under Section 6851 was reasonable under the circumstances and whether the amount so assessed or demanded as a result of the action under the foregoing Section was appropriate under the circumstances. At the Secretary's request, the Petitioner's Appellate hearing was postponed until October 20, 1981. On November 2, 1981, the secretary denied Petitioner's claim that the Department of Treasury had unreasonably and inappropriately assessed income to Petitioner ARTURO FERNANDEZ. (R. at 10) (App. at 7).

Thereafter, on November 16, 1982, ARTURO FERNANDEZ filed his Petition for Determination under Title 26 U.S.C. Section 7429 (b) asking for the federal district court's judicial review of the termination assessment (App. at 10-19).

The District Court judge found that he was without jurisdiction to hear the Petition for Determination filed by ARTURO FERNANDEZ because the Petition was time barred. A timely appeal challenging the reasonableness of the termination assessment to the Eleventh Circuit Court of Appeals was filed. (App. at 9). On May 2, 1983, the Eleventh Circuit Court of Appeals affirmed the District Court's ruling and this petition for writ of certiorari followed.

ARGUMENT: REASONS FOR GRANTING THE WRIT

SUMMARY OF THE ARGUMENT

Pursuant to Rule 17 (1) (c) of the Supreme Court Rules, 28 United States Code, the Eleventh Circuit Court of Appeals, when it affirmed the District Court's ruling, decided an important question of federal law which has not been, but should be, settled by this Court. Through its affirmance of the dismissal of Petitioner's claim as time barred, the appellate court interpreted a new section of the Internal Revenue Code and such interpretation is of first impression to both this Court and the federal courts of appeals.

The District Court committed reversible error by narrowly construing the intent of Congress when it fashioned a judicial remedy for review of termination assessments under 26 United States Code §7429. The intent of Congress in providing review of termination assessments was to balance the power of the Internal Revenue Service to protect its revenue gathering function against the right of the taxpayer to speedy review. The Eleventh Circuit Court of Appeals found that the taxpayer must file on the earliest possible date provided by the Statute. The Statute, on the other hand, states that the taxpayer *may* file on the earliest possible date but also provides a later, alternative date. By finding the action below time barred, the Courts below denied judicial review as a threshhold question to the taxpayer and denied Petitioner the due process of law mandated by the Fifth Amendment of the Constitution of the United States. The intent of Congress in drafting Section 7429 was to provide expeditious judicial review within ascertainable time limits. The interpretation of the Statute by the Courts below resulted in a denial of all judical review of the termination assessment which was not waived by the taxpayer upon a fair reading of the Statute.

ARGUMENT

THE ELEVENTH CIRCUIT COURT OF APPEALS IN AFFIRMING THE DISMISSAL OF THE PETITION OF ARTURO FERNANDEZ FOR DETERMINATION UNDER TITLE 26 U.S.C. SECTION 7429 (B) AS TIME BARRED DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Until the Tax Reform Act of 1976, review of termination of a taxable year was to be conducted solely by the United States Tax Court under Internal Revenue Code Section 6866 which provided:

> Sec. 6866. REVIEW BY TAX COURT.
> (a) Filing of Petition - Within 30 days after the day on which there is notice and demand for payment under Section 6861 (a) or 6862 (a) or notice of termination of taxable period under Section 6851 (a), the taxpayer may file a petition with the Tax Court for a determination under this section.

The Tax Reform Act of 1976 added the requirement that a taxpayer must seek administrative review of the termination assessment as a prerequisite to filing a civil action against the United States in District Court for a judical determination. Section 7429(a) and (b) Internal Revenue Code of 1954. Section 7429 (b) (1) provides:

> Judicial review -
>
> (1) Actions permitted-Within 30 days after the earlier of-
>
> (A) the day the Secretary notifies the taxpayer of his determination described in subsection (a) (3), or

(B) the 16th day after the request described in subsection (a) (2) was made, the taxpayer may bring a civil action against the United States in a district court of the United States for a determination under this subsection.

The applicable Committee Reports explain this change in terms of a policy favoring the exchange of information between the Internal Revenue Service and the taxpayer. The Committee also sought to avoid court proceedings whenever possible. *Joint Commission on Internal Revenue Tax - 94th Congress 2d Session, Legislative History of the Internal Revenue Code of 1954* at 362 (1976).

The Joint Committee stated:

A determination made under new section 7429 will have no effect upon the determination of the correct tax liability in a subsequent proceeding. The proceeding under the new provision is to be a separate proceeding which is unrelated, substantively and procedurally, to any subsequent proceeding to determine the correct tax liability, either by action for refund in a Federal district court or the Court of Claims or by a proceeding in the Tax court.

The requirement that the Service give the taxpayer a written statement of the information upon which it relied in making the jeopardy or termination assessment and the provision for administrative review are provided *because Congress believed that this statement to the taxpayer and an opportunity for administrative review will allow the taxpayer and the Service to exchange information and, in most cases, either to work out a*

solution satisfactory to both parties or *at least to facilitate the court proceeding.* The provisions could delay court review for only 20 days, and, in the judgment of Congress, the delay appears to be more than counterbalanced by the likelihood that the court proceedings would be facilitated by the exchange of information and that some court proceedings could be avoided entirely.

The Act provides for expedited review of jeopardy and termination assessments by the district court because it is contemplated that taxpayers would find it easier and more convenient to bring an action in the district courts rather than in the Tax Court. In addition, since the Tax Court does not have permanent facilities (or judges or commissioners sitting) throughout the country, review of these procedures is likely to be less of a burden if placed in the district courts.

The Act also provides that, during the period necessary to complete administrative review, and, if administrative review is sought, during the period necessary to seek judicial review, property seized pursuant to a jeopardy or termination assessment may not be sold unless (1) it is perishable, (2) the taxpayer consents, or (3) the expenses of conservation or maintenance would greatly reduce the net proceeds. Where judicial review is sought, these restrictions also apply during the period until a judicial determination is made. [Emphasis supplied].

In support of the above legislative intent, the Ninth Circuit Court of Appeals has construed Section 7429 as a tool entitling the taxpayer to prompt relief:

> Section 7429 provides for summary review of termination and jeopardy assessments. Under §7429, a taxpayer is entitled to prompt administrative review by the Internal Revenue Service and judicial review by the district court. Prior to the enactment of §7429, taxpayers subjected to termination or jeopardy assessments were not provided with an avenue for speedy judicial review. See S. Rep. No. 94-938 (Part I), 94th Cong. 2d Sess. 363, *reprinted in* [1976] U.S. Code Cong. & Ad. News, pp. 2897, 3439, 3792-93. Section 7429 was added to the Internal Revenue Code by the Tax Reform Act of 1976 to alleviate the hardship that could be occasioned by a delay in review. *Nichols v. United States*, 633 F.2d 829 (9th Cir. 1980).

In light of this legislative intent, the taxpayer in this case should not have been penalized for his diligent attempt to deal with the assessment on the administrative level. In effect, the Court of Appeal's construction of the statute in the instant action has produced an effect expressly contrary to the intent of the framers of Section 7429, i.e., for two years Petitioner has experienced the hardship of the Government's unreasonable termination assessment with no judicial relief afforded him. If the ambiguous provisions of Section 7429 (b) on judicial review are construed strictly, the legislative intent of encouraging taxpayers to seek an administrative solution to the termination assessments rather than going to court would be defeated. Considering the Congressional intent of

favoring the administrative handling of termination assessments, the judicial review provision of 7429 (b) must be a permissive rather than mandatory time limitation on bringing a court action. This section must be construed to mean that the taxpayer has the option of (1) exhausting his administrative review before using additional legal resources and expense to bring suit against the government or (2) he could bring an action against the government within 30 days after the 16th day after he requested administrative review. Taxpayer FERNANDEZ submits that a permissive construction of the application of the ambiguous judicial review provision is more in line with the intent of Congress to promote administrative review and administrative solutions to ease the burden on the judicial system.

The Trial Court's denial of the taxpayer's petition based upon the alleged untimeliness of the suit, defeats the over-all statutory scheme of furthering administrative review. In addition, such a reading of the statute allows the Internal Revenue Service to use dilatory tactics to avoid giving the taxpayer a fair administrative review by simply postponing the administrative review hearing until after the time limitation has run under Section 7429 (b) (1) (B) [30 days after the 16th day after the administrative review request was made by the taxpayer]. In the instant case, there are circumstances under which a court should go beyond the express language of a statute in order to give force to Congressional intent because "the statute is ambiguous and a literal interpretation would thwart the purpose of the over-all statutory scheme and would lead to an absurd result". *United States v. Public Utilities Commission of California*, 345 U.S. 295, 97 L.Ed. 1020, 73 S.Ct. 706 (1953).

The intentions of the statutory drafters must control when "the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Griffin v. Oceanic Contractors, Inc.*, _____ U.S. _____, 73 L.Ed. 2d 973, 102 S.Ct. 3245 (1982). A reading of the Joint Committee's intent in drafting section 7429, *supra*, reveals that the purpose of the new statute was to enhance the taxpayer's access to administrative review and to "facilitate" the court proceeding. The legislative intent to cut off all judicial review is not reflected in the Joint Committee notes.

In this case, the Petitioner alleged that the Internal Revenue Service did not give him a fair administrative review. Now, the District Court has ruled that there can be no judicial review of that administrative review. At the request of the Internal Revenue Service, the administrative review hearing was postponed until October 20, 1981, or in other words, after the purported time when the taxpayer could seek judicial review in the District Court under Section 7429 (b) 1 (B). Taxpayer FERNANDEZ urged the lower court to find that the government's acts of delay and dilatory tactics in conducting the administrative review amounted to an estoppel to the argument that the taxpayer had failed to file its request for judicial review within the alleged time limitation under Section 7429 (b) 1 (B). *See* e.g., *Schuster v. Commissioner*, 312 F.2d 311 (9th Cir. 1962); *Lattimore v. United States*, 12 F.Supp. 895 (Ct. Cl. 1935). *See also* Note, *Equitable Estoppel of the Government*, 79 COL. L. REV. 551 (1979). The District Court disagreed and was affirmed on appeal.

The terms and time limitations of the statute which provide the only judicial review of termination assessments must be read in a consistent fashion to reach the result intended by Congress. Section 7429 was

enacted to provide the taxpayer with a prompt determination after the termination assessment, not to provide the Internal Revenue Service with an expedient means to deny a taxpayer judicial review of the reasonableness of a termination assessment. It is not inconsistent under the statute as drafted to say that the taxpayer may choose to extend the time for the rendering of the administrative determination and may extend the time for filing the court action by awaiting the Internal Revenue Service's administrative determination.

The intent of Congress can be gleaned from the Committee Report No. 94-938 which states:

> The House bill provided for expedited review of jeopardy and termination assessments by the Tax Court. *The committee amendment provides that such review is to take place in the District Court because it is contemplated the taxpayers would find it easier and more convenient to bring an action in the District Court.* In addition, since the Tax Court does not have permanent facilities (or judges or commissioners sitting) throughout the country, review of these procedures is likely to be less of a burden if placed in the District Courts. [Emphasis added].

If the Congressional intent is to make the taxpayer's job "easier and more convenient", it seems inapposite for the District Courts to favor a contorted reading of the statute which fails to give them jurisdiction to review termination assessments. 26 U.S.C. Section 7429 (B) (1) simply permits judicial action. The statute allows the taxpayer to choose the earlier of

two dates to bring his action for review in the District Court. The taxpayer may go to court within 30 days of the day the Secretary notifies the taxpayer of his determination (presumably adverse to the taxpayer). Or, if the Secretary delays over a 16 day period, the taxpayer may choose to wait only the 16 days for the determination of the Secretary and then may bring an action in the District Court within 30 days of that date. The District Court suggested in its Order of Dismissal that Petitioner's reading of the statute would allow a taxpayer to avoid the time limits and bring suit at any time after administrative review is concluded at the taxpayer's leisure of six months, one year or two years after review is concluded. (R. at 77). That is not true. The statute specifically says that the action must be brought within 30 days after the Secretary notifies the taxpayer of his determination. The judicial review provision of Section 7429 provides the taxpayer with exact dates from which he *may* choose the earlier date. A taxpayer should not be penalized by denial of judicial review by choosing the latter date instead of the earlier date and allowing the administrative review procedure to be fully utilized.

An example of the convoluted logic which results in denial of judicial review despite the remedial nature of the statute is the case of *Zakem v. United States*, 78-2 U.S.T.C. 9584 (W.D. Wis. 1978). In *Zakem*, the District Court dismissed the action because the taxpayer brought suit in the District Court within 30 days of notification from the district director of the determination with regard to his assessment.

The same reasoning was applied in *Bryant v. United States of America*, 81-1 U.S.T.C. 9296 (D. Tenn. 1981). In *Bryant* the plaintiff's complaint stated that on August 28, 1980 he received a letter of termination

assessment informing him that his tax year was terminated as of August 27, 1980 and that he was liable for a tax due of $72,536. Plaintiff did not, within 5 days, receive a written statement of information upon which the Secretary relied in making the assessment as required by statute. On September 23, 1980 Plaintiff filed a protest against the assessment, thereby invoking administrative review of the termination assessment. This letter was received by the defendant on September 26, 1980. A conference was held by the Regional Appeal's office on November 25, 1980 and the information on which the assessment was based was provided to the plaintiff. The complaint in this action was filed on December 9, 1980. The Court, in its order dismissing the complaint, stated that first, sub-section a of the Statute applied. The Court assumed that the conference held on November 25, 1980 by the Regional Appeal's office constituted the notice referred to in subsection (b)(1)(A) of 7429. The filing of plaintiff's action would have been timely for the next 30 days or through December 25, 1980. The Court examined the time sequence under sub-section b. The Court concluded that the plaintiff requested review of his assessment by way of a protest letter dated September 23, 1980. This letter was received on September 26, 1980. The Court assumed that notice was effective upon receipt, and the appropriate time period for filing included 16 days plus 30 days after September 26, 1980 or a final filing date of November 12, 1980. The Court found that because the November 12, 1980 date was the earlier of the two dates, it was the last day upon which an action could have been timely filed. Accordingly, the Court dismissed the plaintiff's action because it was filed on December 9, 1980 and was time barred by the statute.

The hard line taken by the District Courts in *Zakem* and *Bryant* is unnecessarily burdensome in its logic and departs from the Congressional intent to provide the taxpayer easy access to the courts for speedy resolution of termination assessments made by the Secretary.

In the instant case, the fundamental principle of law that a litigant must exhaust his administrative remedies is cut short by this unusual judicial review provision as interpreted by the Courts below. Prior to exhausting his administrative remedies, the taxpayer must forego judicial review because a statute is interpreted to mean mandatory filing on an earlier date despite the fact that the statute's permissive language expressly states that it *may* be filed on the earlier date. This interpretation offends due process of law principles as well as fundamental statutory interpretation principles. Wherever possible, courts should give statutes their clear meaning and take into account Congressional intent. In the instant case, the District Court departed from these principles and committed reversible error.

This Court should curb the egregious error committed by the District Court and affirmed by the Court of Appeals denying access to the federal courts where the Congressional intent was to allow a taxpayer to have speedy judicial review of administrative actions by the Internal Revenue Service because of the unusual, confiscatory nature of termination assessments. The taxpayer ARTURO FERNANDEZ was compelled to bear the burden of an early assessments of taxes and to bear the burden of levy and lien for payment of tax without any judicial review and was precluded from litigating in the Tax Court. It is for these reasons that the District Court should have been more generous in its interpretation of a remedial statute.

The Court of Appeals, by affirming the District Court's ruling, interpreted the time limitations of Section 7429 of the Internal Revenue Code inconsistently with the intent of Congress to provide the taxpayer with efficient and just relief and in so doing has denied Petitioner his constitutionally guaranteed right to due process and his day in Court. In the alternative, the language of Section 7429 is so ambiguous that, upon a fair reading of it, its permissive "may" language fails to give a taxpayer notice of his obligation to file upon the earlier dates mentioned in Section 7429 (b) (1). Although the *Zakem* and *Bryant* courts agreed with the Court of Appeals opinion issued in this action (App. at 3-4), no other Court of Appeals has directly addressed the statutory interpretation of Section 7429 (b) (1) with respect to timeliness of actions permitted. Thus, Petitioner raises an issue of first impression which is an important issue of federal law which has not been, but should be, settled by this Court.

CONCLUSION

A writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit rendered and entered on May 2, 1983 in this cause.

Respectfully submitted,

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(305) 374-5030

BY: _____
ANDREW C. HALL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to MICHAEL L. PAUP, Chief, Appellate Section, United States Department of Justice, Washington, D.C. 20530 and Solicitor General, Department of Justice, Rex E. Lee, 10th and Constitution Avenue N.W., Washington, D.C. 20530 on this 1st day of August, 1983.

BY: _____
ANDREW C. HALL

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